

## Department of the Army, DoD

## § 516.49

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

(d) Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other governmental entities for records which are classified or otherwise privileged from release will be referred to Litigation Division. (See § 516.41(g).

### DA PERSONNEL AS WITNESSES IN PRIVATE LITIGATION

#### § 516.47 Response to subpoenas, orders, or requests for witnesses.

(a) *Policy.* The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information. (See appendix F—Glossary to this part).

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will seriously interfere with the accomplishment of a military mission.

(b) *Former DA personnel.* Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (paragraph (a)(1) of this section) or concerning expert testimony prohibited by § 516.49. In those instances, the subject of the request or subpoena should take the action specified in §§ 516.41(c) and 516.42.

(c) *Present DA personnel.* Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

(d) *Discretion to testify.* Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not au-

thorized to consult with Army counsel should consult with private counsel, at no expense to the government.

#### § 516.48 Official information.

(a) In instances involving § 516.47(a)(1), the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to § 516.47(a). The deciding official will determine whether to release the information sought under the principles established in § 516.44. If funding by the United States is requested, see § 516.55(d).

(b) If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of §§ 516.49 and 516.50. (See, for example, figure G-2, appendix G, to this part). A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

#### § 516.49 Expert witnesses.

(a) *General rule.* Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States.

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(See figure G-3, appendix G of this part). An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to Litigation Division.

(b) *Exception to the general prohibition.* If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

(c) *Exception for AMEDD personnel.* Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations (See figure G-4, appendix G, of this part):

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions taken in the regular course of their duties.

(2) They limit their testimony to factual matters such as the following: their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

(d) *Court-ordered expert or opinion testimony.* If a court or other appropriate authority orders expert or opinion testimony, the witness will immediately notify Litigation Division. If Litigation Division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. If directed by Litigation Division, however, the witness will respectfully decline to comply with the subpoena or order. (See *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

(e) *Expert witness fees.* All fees tendered to present DA personnel as an expert or opinion witness, to the extent

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they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the Treasurer of the United States.

### §516.50 Interference with mission.

If the absence of a witness from duty will seriously interfere with the accomplishment of a military mission, the SJA or legal adviser will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal adviser will refer the matter to Litigation Division.

#### LITIGATION IN WHICH THE UNITED STATES HAS AN INTEREST

### §516.51 Response to subpoenas, orders, or requests for witnesses.

(a) Referral to a deciding official. Requests, subpoenas, or orders for official information, interviews or testimony of present or former DA personnel in litigation or potential litigation in which the United States has an interest, including requests from DOJ, will be resolved by the SJA or legal adviser pursuant to the principles of this subpart. Litigation Division will be consulted on issues that cannot be resolved by the SJA or legal adviser.

(b) Reassignment of witnesses. When requested by the U.S. Attorney, the SJA or legal adviser will ensure that no witnesses are reassigned from the judicial district without advising the DOJ attorney. If a witness is vital to the government's case and trial is imminent, the SJA or legal adviser should make informal arrangements to retain the witness in the command until trial. If this is not feasible, or if a satisfactory arrangement cannot be reached with the DOJ attorney, the SJA or legal adviser should notify Litigation Division.

### §516.52 Expert witnesses.

Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to Litigation Division unless the request involves a matter that has been delegated by Litigation Division to an SJA or legal adviser. In no event, may present or former DA personnel furnish expert or opinion testimony in